Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd

HIGH COURT (KUCHING) — ADMIRALTY IN PERSONAM NO KG 1 OF 1994–I
STEVE SHIM J
24 NOVEMBER 1997

Civil Procedure *— Affidavits — Affidavit in support of application — Filing and service of — Whether the 14-day period within which an affidavit in support must be filed and served on the other party should be computed from the date of the filing of the application or 14 days from the date of sealing of the application — Rules of the High Court 1980 O 32 r 13(2)(a)*

Civil Procedure *— Affidavits — Affidavit in support of application — Served on defendant beyond 14 days — Reasons for delay given in the nature of evidence from the Bar — Whether acceptable — Whether reasons for delay should have been given by way of an affidavit*

The plaintiff filed a summons in chambers dated 19 September 1996 for an order of discovery against the defendant. The affidavit in support of the application was served on the defendant on 14 October 1996. The defendant raised a preliminary objection that the plaintiff was in breach of O 32 r 13(2)(a) of the Rules of the High Court 1980 ('the RHC') because the affidavit in support was served outside the 14-day period. It was argued that the 14-day period started to run as from the date of the filing of the summon in chambers (19 September 1996). The plaintiff however contended that the 14-day period should commence from the date of sealing of the summons in chambers (7 October 1996). Alternatively, the plaintiff contended that if there was contravention, such contravention would be a mere irregularity curable under O 2 of the RHC and gave reasons for the delay. The defendant contended that the reasons for the delay given by the plaintiff should not be accepted as they were in the nature of evidence from the Bar. He contended that such reasons should have been given by way of an affidavit properly sworn and attested but in this case no such affidavit had been made.

Held, allowing the preliminary objection:

(1) The words stipulated in O 32 r 13(2)(a) are perfectly clear and precise and they must reasonably be construed to mean that any affidavit used to support an application has to be served on the other party within 14 days from the date of the filing of the said application. It would therefore have been necessary in the instant case for the plaintiff to serve the unsealed copy of the summons in chambers together with the supporting affidavit on the defendant pending the eventual sealing of the documents by the court registry. This was never done. In the circumstances, the plaintiff had clearly contravened the express provisions of O 32 r 13(2)(a) in failing to serve the affidavit in support of the

summons in chambers within 14 days from the date of the filing of the said summons in chambers (see pp 87E–F and 88C–D); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 followed.

(2) It would be wrong to accept the reasons for the delay given from the Bar. The plaintiff should have filed an affidavit stating the reasons, if any, for the delay. This omission was further compounded by the failure on the part of the plaintiff to apply for an extension of time to serve the affidavit in support. Such omission and failure would have a prohibitive or restrictive effect on the court in considering any affidavit filed out of time. Therefore, the plaintiff's belated oral application for extension of time made during the course of submission could not be entertained. This court could not be seen to be condoning the negligence or mistake of the plaintiff at the expense and prejudice of the defendant (see p 89B–E); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 and *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 followed.

[Bahasa Malaysia summary

Plaintif telah memfailkan satu saman dalam kamar bertarikh 19 September 1996 untuk satu perintah penzahiran terhadap defendan. Afidavit menyokong permohonan disampaikan kepada defendan pada 14 Oktober 1996. Defendan membangkitkan bantahan permulaan bahawa plaintif melanggar A 32 k 13(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana afidavit menyokong disampaikan di luar tempoh 14 hari. Ia dihujahkan bahawa tempoh 14 hari bermula dari tarikh pemfailan saman dalam kamar (19 September 1996). Namun demikian, plaintif berhujah bahawa tempoh 14 hari patut bermula dari tarikh meterai saman dalam kamar (7 Oktober 1996). Secara alternatif, plaintif berhujah bahawa sekiranya terdapat pelanggaran, pelanggaran demikian hanya akan merupakan luar aturan semata-mata yang boleh dipulihkan di bawah A 2 KMT dan memberikan alasan untuk kelewatan. Defendan berhujah bahawa sebab-sebab untuk kelewatan yang diberikan oleh plaintif tidak patut diterima kerana mereka bersifat keterangan dari meja peguam. Dia menghujahkan bahawa sebab-sebab demikian patut diberikan menerusi afidavit yang diikrar dan diakusaksi dengan sewajarnya tetapi dalam kes ini tiada afidavit begitu telah dibuat.

Diputuskan, membenarkan bantahan permulaan:

(1) Perkataan-perkataan yang ditetapkan dalam A 32 k 13(2)(a) adalah jelas dan tepat dan mereka mestilah ditafsirkan secara munasabah untuk membawa maksud bahawa sebarang afidavit yang digunakan untuk menyokong permohonan mesti disampaikan kepada pihak yang satu lagi dalam tempoh 14 hari dari tarikh pemfailan permohonan tersebut. Maka adalah perlu

dalam kes ini untuk plaintif menyampaikan salinan saman dalam kamar yang tidak bermeterai bersama dengan afidavit menyokong kepada defendan sementara menunggu meterai dokumen-dokumen oleh pejabat pendaftar mahkamah. Ini tidak dilakukan. Dalam keadaan begini, plaintif jelas telah melanggar peruntukan nyata A 32 k 13(2)(a) dalam kegagalan untuk menyampaikan afidavit menyokong saman dalam kamar dalam tempoh 14 hari dari tarikh pemfailan saman dalam kamar tersebut (lihat ms 87E–F dan 88C–D); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 diikut.

(2) Adalah salah untuk menerima sebab-sebab untuk kelewatan yang diberikan dari meja peguam. Plaintif sepatutnya telah memfailkan afidavit dengan menyatakan sebab-sebab, jika ada, untuk kelewatan. Peninggalan ini seterusnya dijadikan lebih buruk oleh kegagalan plaintif untuk memohon perlanjutan masa bagi menyampaikan afidavit menyokong. Peninggalan dan kegagalan demikian akan mempunyai kesan larangan atau menyekat pada mahkamah dalam mempertimbangkan sebarang afidavit yang difailkan di luar masa. Maka, permohonan lisan plaintif yang terlambat untuk perlanjutan masa yang dibuat semasa penghujahan berlansung tidak boleh dilayan. Mahkamah ini tidak boleh kelihatan seolah menggalak kecuaian atau kesilapan plaintif sehingga menjejaskan dan memudaratkan defendan (lihat ms 89B–E); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 dan *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 diikut.]

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

KS Chua & Co v Chui Miang Chew & Ors [1995] 4 MLJ 436 (folld)
Malayan Banking Bhd v Lim Tee Yong & Ors [1994] 3 MLJ 715 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (folld)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Punca Klasik Sdn Bhd v Seok Kim Leow [1996] 5 MLJ 241 (refd)
Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (folld)
Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 (folld)

Legislation referred to

Rules of the High Court 1980 O 2, O 24 r 7(3), O 32 r 13(2)(a)

Albert Tang (*Chew, Jugah, Wan Ullok & Co*) for the plaintiff. A
Leonard Shim (*Reddi & Co*) for the defendant.

Steve Shim J: In this case, the plaintiff took out a summons in chambers dated 19 September 1996 for an order of discovery in respect of an admiralty in personam action against the defendant. It is supported by the affidavit of Mr Albert Tang Yew Liong, counsel for the plaintiff. The B application is resisted by the defendant who has filed an affidavit affirmed by Mr Then Teck Soon, the defendant's chairman.

At the hearing of the said summons in chambers on 31 March 1997, the defendant through its counsel, Mr Leonard Shim, objected to the application on two grounds: (1) that the plaintiff was in breach of O 32 C r 13(2)(a) of the Rules of the High Court 1980 ('the RHC'); and (2) that the plaintiff was also in breach of O 24 r 7(3) of the RHC. After hearing arguments on preliminary objection (1) above, I decided, upon being informed by Mr Albert Tang, counsel for the plaintiff, that he was not specifically prepared to reply to preliminary objection (2), to take another D date. Mr Albert Tang also indicated that the plaintiff might consider filing a supplementary affidavit which prompted Mr Shim to respond by stating that they would reserve their right to object to any such filing.

Subsequently, the plaintiff did file a supplementary affidavit affirmed by Mr Albert Tang on 26 April 1997 and this was apparently served on the defendant on the same date. When the case came before me on E 22 September 1997 for continued hearing, Mr Shim objected to the filling of this supplementary affidavit.

In raising the first preliminary objection, Mr Shim submitted in effect that there was a failure on the part of the plaintiff and/or its solicitors to comply with the requirement under O 32 r 13(2)(a) of the RHC to serve F the affidavit in support of the summons in chambers dated 19 September 1996 on the defendant and/or its solicitors. Order 32 r 13(2)(a) stipulates:

> (2) Save as otherwise provided in these rules —
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date G of the filing of the application;

Mr Shim reiterated that the affidavit in support affirmed by Mr Albert Tang was served on the solicitors of the defendant on 14 October 1996 after the summons in chambers together with the supporting affidavit was filed with the court registry on 19 September 1996, which under the said H rules would be 11 days out of time. He cited a number of cases which apparently emphasized the need to comply strictly with rules of procedure: see *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678; *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436; *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85; *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715 and *Punca Klasik* I *Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241. He contended that the 14-day requirement under O 32 r 13(2)(a) started to run as from the date of the filing of the summons in chambers, that is to say on 19 September

A 1996 when the said summons in chambers was filed with the court registry. Mr Albert Tang, for the plaintiff, however, contended that the said 14-day period should commence from the date of sealing of the summons in chambers by the senior assistant registrar which would be on 7 October 1996 and that as the said summons in chambers together with the supporting affidavit was served on the defendant's solicitors on 14 October 1996, they had effectively complied with the requirement under O 32 r 13(2)(a) of the RHC. He cited in support the Court of Appeal case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* which was also relied on by Mr Shim. In that case, the defendants had served an unsealed copy of the summons in chambers and the supporting affidavit on the plaintiffs within 14 days of the filing of the said summons in chambers. They served the sealed copy of the summons in chambers much later. The plaintiffs served the affidavit in reply outside the 14-day period of service of the unsealed copy but well within the 14-day period of service of the sealed copy thereof. The Court of Appeal held that time should run from the date of service of the sealed copy. It has, I think, to be noted that *Perbadanan Nasional Insurans* was concerned with O 32 r 13(2)(b) and not with O 32 r 13(2)(a) which concerns the instant case. Here, the plaintiff and/or its solicitors had not served or attempted to serve the unsealed copy of the summons in chambers. The factual situation in *Perbadanan Nasional Insurans* is therefore quite different from our case.

In the circumstances, I am unable to agree with the stand taken by Mr Albert Tang because I think the words stipulated in O 32 r 13(2)(a) are perfectly clear and precise and they must reasonably be construed to mean that any affidavit used to support an application has to be served on the other party within 14 days from the date of the filing of the said application. In this regard, I will adopt the stand taken by the Court of Appeal in *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581, in particular that part of the judgment of Mahadev Shankar JCA which reads (at pp 585–586):

> The object of O 32 r 13(2) was set out by Richard Tallala J in *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p 174 where he said this:
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> > 'As I understand it, r 13 originally stood as it now does in sub-r 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rules Committee in introducing r 13(2) intended that its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O 14.'
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> We would respectfully adopt these observations
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> However, we would like to add that the critical words in O 32 r 13(2) — for the purposes of computation of time — are 'within 14 days from the date *of the filing* of the application' ... .

> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with this part of the judgment of the learned judge in the court below and in the case of *Pua Lai Ong* earlier referred to. The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the registry. By the time that event took place it was envisaged that the affidavit in support of the application would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard.

In the light of the observations made by the Court of Appeal in *Structural Concrete*, it would therefore have been necessary in the instant case for the plaintiff and/for its solicitors to serve the unsealed copy of the summons in chambers together with the supporting affidavit on the defendant and/or its solicitors pending the eventual sealing of the documents by the court registry. This was never done. The reason for not doing so was apparently because the solicitors of the plaintiff were awaiting the formal sealing of the summons in chambers filed by them with the court registry. In the circumstances, the plaintiff and/or its solicitors had clearly contravened the express provisions of O 32 r 13 (2)(a) of the RHC in failing to serve the affidavit in support of the summons in chambers within 14 days from the date of the filing of the said summons in chambers.

Having concluded thus I now consider the alternative submission raised by Mr Albert Tang, namely, that if there was contravention, such contravention would be a mere irregularity curable under O 2 of the RHC. He cited two reasons for this: (1) that the delay was due to no fault of the plaintiff and/or its solicitors as they had to wait for the sealing of the summons in chambers by the court registry; and (2) that the delay had not caused any prejudice to the defendant. Mr Shim responded by stating that the reasons for the delay given by Mr Albert Tang would not and should not be accepted as they were in the nature of evidence from the Bar. He contended that such reasons should have been given by way of an affidavit properly sworn and attested but in this case no such affidavit had been made or was forthcoming. He cited the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 in which the Court of Appeal stated (at p 287):

> ... It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated.

He also cited the case of *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 wherein Abdul Kadir Sulaiman J said (at p 686):

> Order 32 r 13(2)(a) uses an imperative word 'must'. In its ordinary meaning, it is a word of absolute obligation. Therefore, for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel for the defendant that it renders the said affidavit inadmissible. Order 2 r 1 of the RHC would not be of help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said

A affidavit apart from using the order as a shield. That leaves the application of the plaintiff without any supporting evidence.

I would, with respect, agree with the sentiments and observations expressed by Abdul Kadir Sulaiman J and accordingly, I am of the view there is merit in Mr Shim's proposition. It would be wrong to accept the reasons for the B delay given from the Bar. The plaintiff and/or its solicitors should have filed an affidavit stating the reasons, if any, for the delay. This omission is further compounded by the failure on the part of the plaintiff and/or its solicitors to apply for an extension of time to serve the affidavit in support. Such omission and failure will have a prohibitive or restrictive effect on the court in considering any affidavit filed out of time. In this connection, I am C in entire agreement with the sentiments expressed by Abdul Malik Ishak J in *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 when he said (at p 443):

> ... The strict requirement under this rule will simply mean that the courts are not obliged and indeed are precluded from considering any affidavits D filed out of the 14-day period unless applications to file those affidavits out of time formally have been made and granted by the courts.

In the present case, as I have said, the plaintiff and/or its solicitors have not made any application for abridgment of time at the proper time. Mr Albert Tang's belated oral application for extension of time made during the E course of submission could not be entertained. This court could not be seen to be condoning the negligence or mistake of the plaintiff and/or its solicitors at the expense and prejudice of the defendant.

In the particular circumstances of this case, I will sustain the first preliminary objection raised by the defendant. In view of the conclusion I F take, there is therefore no necessity to consider the second preliminary objection. That being the position, I will disallow the use of the affidavit in support affirmed by Mr Albert Tang Yiew Liong on 19 September 1996. Having thus expunged the said affidavit, the summons in chambers filed by the plaintiff stands naked and alone and must therefore be dismissed with cost to be taxed.

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Preliminary objection allowed.

Reported by Jafisah Jaafar

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